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No. 99-411

In the Supreme Court of the United States

BOARD OF TRUSTEES OF
SOUTHERN ILLINOIS UNIVERSITY, PETITIONER

v.

THEODORE F. WICHMANN
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 180 F.3d 791. The memorandum opinion and order of the district court (Pet. App. 58-63) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 7, 1999. The petition for a writ of certiorari was filed on September 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C.

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. III 1997). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. IV 1998). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. IV 1998). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (1994 & Supp. IV 1998) (federal); 29 U.S.C. 623(j) (Supp. III 1997) (state).

626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. Southern Illinois University employed respondent for twenty years, during which time he consistently received "glowingly positive" evaluations. Pet. App. 1-2. In 1994, the University terminated respondent and redistributed his responsibilities to younger faculty members. *Id.* at 2-4. The University contended that the firing "was to resolve a budget deficit." *Id.* at 2. A University accountant testified, however, that no positions were eliminated by respondent's discharge and that the program's financial position was "in fact jeopardized" by respondent's dismissal. *Id.* at 3, 4.

Respondent filed suit in federal district court alleging that petitioner had fired him from his job on the basis of age, in violation of the ADEA. Pet. App. 4. Petitioner moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at 58. The district court denied the motion to dismiss. *Id.* at 58-63. Petitioner chose not to seek an interlocutory appeal of that judgment, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), but instead chose to proceed to trial. A jury entered a verdict in favor of respondent and found that the ADEA violation was "willful." Pet. App. 41. The court awarded back pay and ordered respondent reinstated. *Id.* at 39-40.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals affirmed. Pet. App. 1-28.

The court of appeals "reaffirm[ed] [its] previous view" that the ADEA validly abrogated Eleventh Amendment immunity. Pet. App. 6. First, the court concluded (*id.* at 7) that Congress made its intent to abrogate Eleventh Amendment immunity "unmistakably clear" in the ADEA. The court of appeals also held that the ADEA was appropriate remedial legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The court concluded that the ADEA was "not particularly intrusive," because it was "limited to a 'discrete class' of state laws and actions, viz., those concerning age criteria for public employment" and "impos[ed] no affirmative obligations on the states." *Id.* at 12-13 (citation omitted). In "view of its relative lack of intrusiveness," the court found that the statute was a proportional response to the factual findings "embodied * * * in the statute" from which Congress could have "properly concluded that application of the ADEA to public employment is necessary to remedy or deter constitutional violations." *Id.* at 13-14.

ARGUMENT

On January 25, 1999, this Court granted review in *United States* v. *Florida Bd. of Regents*, 119 S. Ct. 902 (No. 98-796), and *Kimel* v. *Florida Bd. of Regents*, 119 S. Ct. 901 (No. 98-791). Oral argument was heard in those cases on October 13, 1999. As petitioner acknowledges (Pet. 5), the questions of abrogation of Eleventh Amendment immunity under the ADEA raised by this petition are identical to those presented in Nos. 98-796 and 98-791. Accordingly, this petition should be held

pending the Court's decision in those consolidated cases.[2]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases.

Respectfully submitted.

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[2] Petitioner first requests (Pet. 5, 16-17) that its petition be granted and the case consolidated with the *Florida Board of Regents* cases. Because the petition was not filed until shortly before the petitioners' reply briefs were filed and because oral argument has already been completed, consolidation is not a viable option.